In the Supreme Court of the United States

October Term, 192[illegible].

No. [illegible]

Charles H. V[illegible],
Appellant,

vs.

The Michigan Central Railroad Company.

Appeal from the District Court of the United States
For the Northern District of Ohio.

BRIEF FOR APPELLEE.

W[illegible], [illegible] & W[illegible],
1750 Union Trust Building,
Cleveland, Ohio,
Solicitors for Appellee.

S. H. W[illegible],
Of Counsel.

INDEX.

Cases Cited.

In the Supreme Court of the United States

October Term, 1925.
No. 190.

Clarence H. Venner,
Appellant,

vs.

The Michigan Central Railroad Company.

Appeal from the District Court of the United States For the Northern District of Ohio.

BRIEF FOR APPELLEE.

STATEMENT.

In 1922 three of the New York Central lines or system of railroads, the New York Central, Michigan Central and Cleveland, Cincinnati, Chicago & St. Louis, jointly executed an equipment trust agreement in the conventional form, under which it was proposed to issue equipment trust certificates and use the proceeds when sold for the acquisition of certain locomotives to be employed by them indiscriminately in intrastate and interstate commerce.

Clarence H. Venner as a stockholder of the Michigan Central filed a suit in the Common Pleas Court of Cuyahoga County, Ohio, to enjoin his corporation from carrying out this arrangement, on the sole ground that it constituted an illegal lending of defendant's credit to the other two railroad companies, the trustee and holders of the certificates (Rec. 3). The case being removed to the fed-

eral court for diversity of citizenship, the defendant answered, setting up that all that was done or proposed was under the sanction of the Interstate Commerce Commission, which on November 8th, 1922, had duly issued its order to that end; and that the district court was without jurisdiction of the cause (Rec. 10).

Thereafter Mr. Venner filed an amended petition setting up as additional ground of complaint the omission of the railroads, parties to the trust, to secure the consent of the Public Utilities Commissions of Michigan, Ohio and other states to the issuance of the equipment trust certificates; and further setting out at length that the defendant claimed the right to proceed "by virtue of an order entered by the Interstate Commerce Commission on November 8, 1922, permitting the said defendant to make the said agreement and approving the same"; and that it claimed that Sec. 20a of the Act to Regulate Commerce as amended "dispensed with the necessity of its obtaining the consents of the said state commissions."

The amended petition then denied that Sec. 20a had the effect claimed, and averred that to so construe it would bring it into conflict with the Tenth Amendment to the Constitution of the United States (Rec. 15-18).

Thereupon defendant moved to dismiss the cause for want of jurisdiction, and because the United States, an indispensable defendant, was not sued. The district court sustained this motion (Rec. 21-22) and certified the jurisdictional question (Rec. 23-24), which is the sole question before this Court. The lower court considered no other, and was careful to make that plain in its opinion (Rec. 21). The bulk of appellant's brief consists of a discussion of the merits of the controversy and very little is said of the question of jurisdiction.

ARGUMENT.

The amended petition affirmatively shows that the defendant was acting under authority of an order of the Interstate Commerce Commission, and avers (Rec. 16):

> "Plaintiff further says that defendant seeks to justify its course in entering into and making said Equipment Trust Agreement, providing for the issue of certificates as aforesaid, by virtue of an order entered by the Interstate Commerce Commission on November 8, 1922, permitting the said defendant to make said agreement and approving the same. Said order of the said Interstate Commerce Commission is claimed by the defendant to have been made under Section 20-a of the Interstate Commerce Act known as the Federal Railroad Act of 1920, Subsection (2)."

The subsection or paragraph of the act referred to reads as follows:

> "(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate

purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Other portions of the section read:

"(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2)."

* * * * *

"(6) Upon receipt of any such application for authority, the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

"(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

The amended petition avers (Rec. 14) that the equipment trust certificates mature annually from September 1, 1923, to 1937, inclusive; that their issuance "is in substance and legal effect and in fact, the issuance of evidences of indebtedness by the defendant company and its associates" (Rec. 16); that the equipment is to be leased by the trustee to the carriers, and upon payment of the certificates becomes their property (Rec. 14-15); and that the net effect of the arrangement is the guaranty by defendant of the obligations of the other companies, contrary to the laws of Ohio and Michigan (Rec. 18). The allegations of the pleading bring the securities and obligations to be issued and assumed clearly within the provisions of Sec. 20a. Prior to the enactment of this law equipment trust certificates such as so described were held to be within the law of New York (which is similar to that of Ohio and Michigan) requiring prior approval of the local commission; they were held to be evidences of indebtedness. *People vs. N. Y. C. & H. R. R. R. Co.*, 138 App. Div. 601. Affirmed 199 N. Y. 539.

The prayer of the amended petition was for an injunction preventing defendant from carrying out the terms of the equipment trust agreement and availing itself of the authority given by the order of the commission. In effect, the commission's order was sought to be annulled and set aside.

This Court has decided in *Lambert Run Coal Co. vs. B. & O. R. R. Co.*, 258 U. S. 377, that such a suit can not be

entertained by a state court, nor on removal, by a federal district court. That case was commenced in a state court to enjoin the carrier from observing a rule prescribed by the Interstate Commerce Commission for the distribution of coal cars; and was removed to the district court, which declined to dismiss for want of jurisdiction. Its decree having been reversed by the circuit court of appeals, this Court said at p. 381, 382:

> "The decree of the district court was properly reversed; but we are of opinion that the circuit court of appeals had no occasion to pass upon the merits of the controversy, and that the direction should have been to dismiss the bill for want of jurisdiction, and without prejudice. The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission, or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect sought. The appellate court was therefore correct in holding that, in such a suit, an injunction of the district court could be granted only by three judges.
>
> "But there are, in addition, two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a Federal district court. Judicial Code, Sections 208, 211; Act of October 22, 1913, chap. 32, 38 Stat. at L. 208, 219; *Illinois C. R. Co. v. Public Utilities Commission,* 245 U. S. 493, 504; *North Dakota ex rel. Lemke v. Chicago & N. W. R. Co.,* 257 U. S. 485; *Texas v. Interstate Commerce Commission,* 258 U. S. 158. The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively

acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the district court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the Federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction."

The fact that Mr. Venner is not shown by the amended petition to have been a party to the proceeding before the Interstate Commerce Commission in which the order complained of was secured is not important. He is a stockholder of the defendant and as such had a direct interest in the matter and was no doubt entitled to intervene before the commission. His amended petition sets out that what is proposed to be done under the order will cause him as a stockholder irreparable damage.

This Court said in *B. & O. R. R. Co. vs. U. S.*, 264 U. S. 258, 268:

> "No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown. *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S. 42; *Skinner & E. Corp. vs. U. S.*, 249 U. S. 557, 562."

In other cases similar to this, Mr. Venner's counsel has contended that a permissive order of the Interstate Commerce Commission such as this is can be enjoined by

a state court, notwithstanding the decision in the *Lambert Run Coal Co.* case, *supra.*

The order authorizing the issuance of the equipment trust certificates is not a negative order such as was held in *Proctor & Gamble Co. vs. U. S.*, 225 U. S. 282, not to be subject to attack in the courts. It is affirmative, although permissive.

Permissive orders have been held subject to attack under Secs. 208 and 211, Judicial Code, in many cases. In *State of Texas vs. U. S.*, 258 U. S. 204, this Court reviewed a decree dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission which sanctioned the discontinuance of the operation of a railroad. The order was granted under pars. 18, 19 and 20 of Sec. 1 of the Act to Regulate Commerce as amended by Transportation Act 1920, and was purely permissive. This was the second case reported, No. 563. A permissive order was involved in *U. S. vs. Atchison, Topeka & Santa Fe Railroad et al.*, 234 U. S. 476. The commission's order authorized transcontinental carriers to charge higher rates for short hauls than for longer hauls to Pacific coast terminals, and it was contended that it was of a negative character and not subject to review. But this Court held otherwise. The decision in *B. & O. vs. U. S., supra,* which involved an order of the commission secured by The New York Central Railroad Company authorizing it to acquire the stock of The Chicago Stock Yards Railroad Company, is conclusive. It is said on p. 263:

> "Nor would the further fact that the order is permissive preclude review if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited. * * * A suit will lie to set

aside an order granting such authority, and to enjoin action by the carrier thereunder." And at p. 264:

> "Here the order complained of is an affirmative one. That is, it grants the relief sought."

All that has been said above would appear to be admitted, as the brief of the appellant concludes:

> "The decree of dismissal of the amended bill and of the suit, for want of jurisdiction, should be reversed on the authority of *Texas vs. Eastern Texas R. R. Co. et al.*, 258 U. S. 204."

The first of these cases, No. 298, was brought in a state court to enjoin the railroad from ceasing to operate in intrastate commerce. Pending the suit, the company's application to the Interstate Commerce Commission for an order permitting it to abandon its line was granted. The case being removed, the federal court held that an answer setting up such certificate of authority constituted a complete defense, and dismissed the suit.

Whether the suit, which related solely to the intrastate operations of the Texas railroad, involved setting aside the order of the commission, depended on the scope of such order and whether when properly construed it affected intrastate commerce at all. In the opinion by Mr. Justice Van Devanter it is said:

> "The road lies entirely within a single state, is owned and operated by a corporation of that state, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or crip-

ple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce.

"If Pars. 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. * * * They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it. As a whole, these acts show that what is intended is to regulate interstate and foreign commerce, and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce.

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

In other words, the Texas railroad and its traffic were of such character that intrastate operations could be continued or abandoned as might seem best to the local authorities, without any interference with or burden upon interstate commerce resulting in either case.

As was said herein by the district court, opinion (Rec. 21):

> "It was held that its independent operation in intrastate commerce was so disconnected from and unaffected by any interstate traffic that, whether it might discontinue its intrastate operations, was wholly outside the interstate commerce law. The determination thereof as between the carrier and the State of Texas did not involve annulling or impairing the order of the Interstate Commerce Commission authorizing the carrier to discontinue its operations, which, under the facts, was interpreted as being limited merely to interstate business."

But such is not the situation in the case at bar. This is not a suit to enjoin the execution of the equipment trust agreement, as it may affect intrastate commerce alone. The amended petition avers that the locomotives to be procured by means of the trust are to be used indiscriminately in both classes of commerce, and, as the court below said, judicial notice will probably be taken that the greater use will be interstate. The order provides for the acquisition of all the equipment and is not susceptible to a construction making it inapplicable to intrastate commerce, as was true in the Texas case. Just as the use of the equipment will be indiscriminate in both classes of commerce, so the order is indivisible as between the two, and must stand or fall as a regulation of interstate commerce, incidentally affecting intrastate traffic to a certain extent.

Appellant's contention that the construction placed by the court below upon the order of the commission is not warranted under any view of Sec. 20a which does not make the latter unconstitutional, is merely another way of saying that such order is void because of the invalidity of the law

under which it was made. That proposition is neither supported by any authority, nor is the question before this Court, which is only concerned with the matter of jurisdiction. Whether the order is invalid because of the unconstitutionality of the law or for any other reason, can only be determined in a suit brought originally in the federal court.

That the decree of dismissal was correct and must be affirmed is,

Respectfully submitted,

WEST, LAMB & WESTENHAVER,
1780 Union Trust Bldg.,
Cleveland, Ohio,
Solicitors for Appellee.

S. H. WEST,
Of Counsel.